Supreme Court, U.S.
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No. 01-949

In The
Supreme Court Of The United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,
Petitioner,
v.
FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION

LAW OFFICES OF YODICE
ASSOCIATES
KATHLEEN A. YODICE
Counsel of Record
500 E Street, S.W., Suite 240
Washington, D.C., 20024
(202) 863-1000
(202) 863-1001 (facsimile)
Counsel for Respondent, Aircraft Owners and Pilots Association

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BRESCIA'S
CALL 800.843.0008

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REPLY BRIEF FOR RESPONDENT AIRCRAFT OWNERS AND PILOTS ASSOCIATION

The brief in opposition filed by the City of Kansas City, Missouri, in summarily dismissing the brief of Respondent Aircraft Owners and Pilots Association (AOPA), misunderstands both the rules and precedent of this Court, and errs in concluding that Respondent's brief is in direct contravention of Petitioner's. Additionally, we note that Respondent City of Kansas City inappropriately summarizes Respondent AOPA's position to this Court by distilling its arguments down to one issue, i.e., deference. Respondent AOPA's brief includes additional reasons to find error in the Eighth Circuit's decision, including the FAA's failure to follow the plain language of the underlying statute.

I. A Party-Respondent May Raise Any Issue Raised Before The Court Below

Under Sup. Ct. R. 12.6, any parties that appeared in the proceeding below are considered parties entitled to file documents before the Supreme Court. A party may choose not to file a petition for writ of certiorari themselves, but may then support their cause by filing a brief in support of a petition for writ of certiorari. Respondent AOPA is thus a party to the proceeding before this Court by virtue of its participation before the Eighth Circuit and Petitioner's filing. As such, it is entitled to make filings in the instant proceeding and raise *any* issues that were raised immediately below.

In O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), the Supreme Court held that when a party to the proceeding below files a petition for certiorari, all other parties below are automatically joined as respondents. Thus, when the Director of the Pennsylvania Department of Public Welfare (DPW) filed a petition for writ of certiorari

before the Supreme Court, the Secretary of the Department of Health, Education, and Welfare (HEW), was an automatic respondent because he was a party to the proceedings below. The court held that "[i]n that capacity, [the Secretary] may seek reversal of the judgment of the Court of Appeals *on any ground* urged in that court." Id. at 783-784 n. 14 (emphasis added).

Three years later, the Court affirmed the principle set forth in O'Bannon. See Director v. Perini North River Associates, 459 U.S. 297, 304 (1983). The petitioner before the Court, the Director of the office of Workers' Compensation Programs (OWCP), was a respondent who filed a brief in support of Churchill in the Second Circuit. Churchill was the petitioner below. He opted not to file a petition before the Supreme Court. When the Director of the Office of Workers' Compensation Programs filed its petition, Churchill was automatically joined as a respondent. In that capacity, Churchill was entitled to "seek reversal of the judgment of the Court of Appeals *on any ground* urged in that court." Id. (quoting O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783-784 FN 14(1980)) (emphasis added).

In the instant case, Friends of Richards-Gebaur Memorial Airport filed a petition for writ of certiorari on January 4, 2002. Consequently, AOPA was automatically joined as a respondent before this Court.

As a respondent, under Sup. Ct. R. 12.6, AOPA need not file a separate petition nor join a petition to make arguments before the Supreme Court. Under O'Bannon and Perini, a respondent may raise *any* argument before the Court so long as it was raised in the proceedings below. Having made the arguments that the FAA stepped beyond its statutory authority by applying an inappropriate and incorrect standard in releasing the City of Kansas City from its obligations under the Surplus Property Act and federal

grant agreements, and that the Eighth Circuit afforded an incorrect level of deference to that decision, Respondent AOPA is entitled to raise those arguments in the instant proceeding.

II. Respondent AOPA's Position Does Not Directly Contravene That Of The Petitioner

The City of Kansas City alleges, "AOPA's position directly convenes the Petitioner's." Brief for Respondent at 5 n. 3. The City of Kansas City states "Friends argues that the Eighth Circuit did not give FAA's Handbook enough deference, while AOPA asserts that the Eighth Circuit gave the FAA too much deference. Both are wrong." Id. The City of Kansas City is plainly in error.

Petitioner Friends of Richards-Gebaur Memorial Airport makes its argument for the reversal of the Federal Aviation Administration's (FAA) decision releasing the City of Kansas City from its obligations to maintain the airport based on environmental review errors, citing FAA Orders 1050.1D and 5050.4A. Order 1050.1D was promulgated pursuant to 40 C.F.R. § 1507.3(a) of the Council on Environmental Quality regulations. Order 5050.4A is the FAA's Airport Environmental Handbook. By contrast, Respondent AOPA argues error in the FAA's decision, based on its lack of authority to make such a decision and targeting the level of deference afforded FAA Order 5190.6A. FAA Order 5190.6A is the FAA's Airport Compliance Requirements and 14 C.F.R. § 155.3 is a Federal Aviation Regulation.

Not only are different agency orders at issue, but different standards of deference and respect are also in question. Petitioner argues that Orders 5050.4A and 1050.1D are entitled to full deference because of statutory authority to promulgate such orders and engagement in the public process. Respondent AOPA argues that only

respect, if that, and not deference, is due Order 5190.6A because it was drafted solely at FAA's discretion, unilaterally, without statutory authority, and without engaging informed public participation.

Petitioner may argue that not enough deference was given Orders 5050.4A and 1050.1D while Respondent AOPA may argue that too much deference was given Order 5190.6A without contradicting each other. The parties argue based not only on different agency orders, but also on completely different statutes, regulations, and related case law and legal principles. While Petitioner and Respondent AOPA argue different grounds, each seeks the same results: (1), a determination that the FAA erred in releasing the City of Kansas City from its obligations under the Surplus Property Act and federal grant agreements, allowing the transformation of a public general aviation airport into an intermodal facility, and (2), that the Eighth Circuit acted contrary to law and precedent in upholding the FAA decision.

CONCLUSION

AOPA is an automatic respondent as a result of the Petition filed by Friends of Richards-Gebaur Memorial Airport. Under Sup. Ct. R. 12.6, AOPA may make filings in this proceeding. Under O'Bannon and Perini, AOPA may present *any* arguments made before the Eighth Circuit. Further, under O'Bannon, Respondent AOPA may go so far as to make arguments that it did not make below, so long as one of the parties below made the arguments and those arguments were addressed by the court. See O'Bannon, 447 U.S. at 783 n. 14. Finally, those arguments AOPA proffered both to the Eighth Circuit and this Court are not in direct contravention of Petitioner's. Both parties argue for the reversal of the Eighth Circuit's decision to uphold the FAA's decision to release the City of Kansas City from its federal obligations. However, each party

supports this contention by referring to the level of deference that was owed to separate, distinct FAA handbooks, versus the level of deference actually accorded.

Respectfully submitted,

Law Offices of Yodice Associates
Kathleen A. Yodice
500 E Street, S.W.
Suite 240
Washington, DC 20024
(202) 863-1000
Attorneys for Respondent, Aircraft Owners and Pilots Association

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